The First Annual BC Symposium on Conflict Resolution
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Attorney General Geoff Plant

Luncheon keynote presentation

"Innovation and Conflict Resolution in the Civil Justice System"

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Introduction

There is great value to this kind of conference at this point in our history. It is critically important that we keep our collective attention focused on the search for affordable and proportionate dispute resolution processes.

An evolving justice system

Our institutions and processes of justice have served us well throughout history, but we must remember that they exist to serve a particular purpose; and that in their present incarnation they never represent more than yesterday's answer to the question: How do we best administer and implement civil and criminal justice?

A justice system is not static; it is an ongoing process that needs to be constantly monitored, evaluated and revised to meet the changing needs of the people it serves. It is especially important in these modern times, where virtually every social institution is being challenged to evolve rapidly and intelligently, that we take stock and continually refocus on our goal of making the justice system more accessible, efficient, fair and affordable.

In a 1999 paper entitled "Professionalism Revisited"[1] Madam Justice Rosalie Abella of the Ontario Court of Appeal describes what she calls "two headwinds" that are threatening to "pollute" the legal professional environment:

- economic pressures, and
- a misplaced preoccupation with process.

Any serious "taking stock" of the justice system today leads quickly and inexorably to these two issues.

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[1] Abella, Rosalie, *Professionalism Revisited*, Ontario Lawyers Gazette, Nov/Dec 1999

Economic pressures

- Affordability is a key aspect of access to justice. It is a concern in every dispute; it has become a grave problem for disputes that do not involve large sums of money.
- More and more Canadians are unable to utilize our civil justice system because of the cost. For such cases, it does not matter how modern, fair or just our system of laws is. If large numbers of people lack sufficient financial resources to fund litigation, then for those people at least the sophistication of our litigation system is quite meaningless.
- The scale of the problem of affordability is becoming increasingly clear. Its most apparent manifestation is the "in-person litigant". The number of individuals seeking to represent themselves before the court appears to be growing steadily. I understand that self-represented litigants are even beginning to appear in the Supreme Court of Canada.

Preoccupation with process

- Directly related to cost is the issue of procedural complexity.
- Somehow, over time, due process seems to have come to mean, for us, *more* process; and so we have created many new procedures and have complicated our litigation dispute resolution processes to the point where it is often too complicated to go through the justice system without a hired guide, and too expensive to go through the system with one.
- Because rules have worked well for us we have assumed that more rules will work better, or even more fundamentally, we have assumed that the answer to all problems in the justice system lies in new or different rules.
- Rosalie Abella: "We have moved from being a society governed by the rule of law to being a society governed by the law of rules."[2]
- In 1996 the *CBA Systems of Civil Justice Task Force Report* observed that:

> "The civil justice system is subject to the inertia of operating 'the way we have always done things', even in the face of clear evidence of unwanted effects such as delay, costs and lack of understanding .... The desire to preserve the status quo creates barriers to substantial change in many aspects of the system."[3]

- Again, this point is eloquently made by Rosalie Abella in her paper when she describes many of the profound changes that have occurred since the turn of the century in our society and in our social institutions, and says:

> ".. with all these profound changes in how we travel, live, govern, and think, none of which would have been possible without fundamental experimentation and reform, we still conduct civil

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[2] Ibid.

[3] *Systems of Civil Justice Task Force Report*, Canadian Bar Association, 1996

> trials almost exactly the same way we did in 1906. Any good litigator from 1906 could, with a few hours of coaching, feel perfectly at home in today's courtrooms. Could a doctor from 1906 feel the same way in an operating room?"[4]

- It is absolutely imperative that as a system we see beyond 'the way we have always done things'.

Solutions and Future Directions

- If we were inventing the system from scratch is this how we would do it? Should it take a thick book of rules and years out of a litigant's life to resolve even relatively simple civil disputes?
- We must look objectively at our system, and think creatively about what innovation means.
- Our motive for doing so is compelling – the very real possibility that the system as we know it will, by reason of cost, delay and complexity, become functionally irrelevant for much of society.
- I would like to offer some thoughts that I suggest might guide us when we think about and implement innovations in the justice system.

1. Changes must be user-based, client-centered

- We should always start with a question that is asked by the legal realism school of jurisprudence: "What exactly does the justice system serve?" A related question is: "Who exactly does the justice system serve?"
- Every time we confront a structural problem within the justice system and every time we propose a solution or an innovation for the system, we should be asking ourselves the question: "What does this serve?"
- The answer that we must be looking for is that the justice system (and any changes we propose to it) must serve the public, <u>not its own internal culture</u>. This means that the system does not serve the needs of lawyers, judges, court administrators, or mediators. Nor should it unthinkingly respond to the values, traditions and procedures of these groups, even if they have been around for a long time.
- The fact is that many of our innovations have been designed, in good faith, by lawyers and judges for lawyers and judges. The great importance of the legal principles that guide their thinking means that sometimes not enough weight is given or attention paid to balancing the practical interests of the customers. In what other

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[4] Abella, Rosalie, *Professionalism Revisited*, Ontario Lawyers Gazette, Nov/Dec 1999

viable service industry in this day and age do its innovations and improvements constantly push the cost of the product up?

- Many of those inside the justice system are very familiar and very comfortable with the system; and this comfort leads to inertia, or even to resistance to reforms that challenge established legal culture and tradition. Being unable to deny the existence of grave problems within the system they are prepared to support change, but only modest change, reforms around the margins – tinkering with procedures but not prepared to entertain or support fundamental change.
- In their book "Innovative Dispute Resolution: the Alternative" Richard McLaren and John Sanderson describe how, traditionally, a conflict that is brought to the law is translated into the language of legal issues, legal rights, legal principles and legal procedures until it becomes "unrecognizable to the person who brought it to the lawyer"[5]. Understanding of and control over the conflict diminish until the client is reduced to observer status, ostensibly giving instructions, but not really understanding what the dispute has become. These authors see the movement towards innovative dispute resolution mechanisms as "nothing more than a response to this isolation from the problem, lack of control over the process, and being barred from participating in the crafting of the solution."[6] I think there is much good sense in this analysis, and I strongly suspect that the future direction for successful dispute resolution innovations must involve uncomplicated, straight-forward processes which are highly sensitive to the needs of the parties and offer the parties a high degree of involvement and control.

2. The idea of justice should include more than the getting the right answer to a legal issue

- Again, taking our queue from the legal realists, justice is more than a technically accurate legal resolution; it includes the feeling or subjective conviction by the parties at the end of the process that the system worked for them, that justice was done in their case.
- What does it take for parties to feel that justice has been done? Research out of your discipline, ADR, gives us some very important information about this.
  - Parties do not need a day in court to feel that justice was done.

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[5] McLaren, Richard H. and Sanderson, John P., Q.C., *Innovative Dispute Resolution: The Alternative*, Carswell, 1994

[6] Ibid.

- In fact, they often do not feel justice was done even after their day in court.
- Process satisfaction rates with mediation tend to be higher than for litigation.
- The single most important ingredient for a party to a dispute resolution process is the sense that he or she was fairly, fully and accurately heard.
- It is interesting that this is more likely to happen in a structured informal process like mediation than in litigation.

3. Keep it simple

- Ensure that our innovations do not become as complex and unaffordable as the processes we seek to improve upon.
- Arbitration is an example of an ADR process that began as a true alternative but often so closely mimics the full blown litigation process as to have lost much of its value as an alternative.
- This is certainly one of the most attractive aspects of mediation. It is a simple process that has the capacity to transform complex problems into manageable terms, usually to the extent that the parties themselves can take considerable responsibility for resolving their own dispute.

4. Make it fundamental

- Part of our problem may be our individual and corporate incapacity to *imagine* a really different system.
- If discussions of justice reform begin with the unquestioned assumption that the task is to "tweak" or merely adjust the existing system, the potential range of solutions is restricted enormously. When I refer to "innovation" in the title of my speech today, I am not thinking of work in the margins; I mean to refer to a level of analysis and a breadth of response that goes beyond tweaking. I note that the title of the first paper published by the BC Justice Review Task Force is "Exploring *Fundamental* Change"
- What do I mean by "fundamental" change? Something that questions and changes what we otherwise take for granted. For example, historically the justice system has taken the "rights-based analysis" of conflict and the adversarial approach for granted. Thus, I would say that mediation represents a *fundamental* change.
  - It potentially reframes disputes from the language of legal rights and obligations to the language of needs and interests.

        - It also reshapes the role of the lawyer by involving the parties so that they deal directly, not through agents, to take responsibility, or at least more responsibility, for making their own resolution.
    - I would also say that collaborative family law represents a fundamental change.
        - It reframes conflict from an adversarial contest to an exercise in collaborative problem solving.
        - I hope and expect that the collaborative model will do what mediation did and move beyond family into other areas of law.

In the Ministry's Service Plans and other program documents published over the last two years I have tried to emphasize the following themes:

- we must strive for an accessible justice system that offers timely and affordable dispute resolution,
- in that justice system litigation must be seen as a valued but last resort in dispute resolution, and
- we must devise innovative "off-ramps": simple, inexpensive, dispute resolution alternatives to litigation.

These themes are, I think, highly congruent with your work, and I commend the field of conflict resolution for the effort expended in the service of these themes so far. As the presentations at this symposium will doubtless make clear, there have been great advances in mediation theory, practice, research, policy and pedagogy over the last 10 years. My own conviction is that, despite the huge growth in use of alternative conflict resolution processes, the potential of such processes to serve the needs of people in conflict is still nowhere near fully utilized.